No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit.

P. H. JOHNSON,
Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Statement of the Case.

1. INTRODUCTION.

On the 28th day of February, 1920, the President of the United States by proclamation, pursuant to Section 211 of Transportation Act of 1920, duly designated and appointed the Director General of Railroads, or his successor in office, either personally or through such divisions, agents or other persons as the latter might appoint, to exercise and perform all and singular the powers and duties conferred or imposed upon the President of the United

States by the provisions of said Transportation Act of 1920, except the designation of the agent under Section 206 of said Transportation Act, and the President of the United States did thereby confirm and continue in the Director General of Railroads, and his successor in office, all powers and authority heretofore conferred under the Federal Control Act, approved March 21, 1918, except as such powers and authority have been limited in the said Transportation Act, and the Director General of Railroads, or his successor in office, was by the President of the United States authorized and directed, until otherwise provided by proclamation of the President or by Act of Congress, to do and perform as fully in all respects as the President is authorized to do, all and singular the acts and things necessary or proper in order to carry into effect the provisions of said proclamation and the unrepealed provisions of said Federal Control Act.

That, during all the times mentioned in all of the pleadings, papars and files in this action and during all of the times covered by this litigation, the Director General of Railroads was the duly appointed, qualified and acting agent of the President, pursuant to said proclamation and pursuant to said Section 211 of the Transportation Act of 1920.

In view of the admitted facts hereinafter immediately following this introduction, it is deemed unnecessary here to make a detailed statement of the facts of this case and for the sake of brevity

and convenience any further reference, other than to the admitted facts hereinafter set out, will be omitted.

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2. THE ADMITTED FACTS.

On November 2, 1918, the defendant herein, by a diversion order, intercepted, while still on the line of the initial carrier, Southern Pacific Company, at Tucson, Arizona, 101,700 pounds of chrome ore loaded on Erie car No. 51611, originally shipped from Clovis, California, by the I. D. Payne Company, consigned to its order notify R. D. Adams, the destination of which shipment was Glen Ferris, West Virginia, and diverted the same to Coatesville, Pennsylvania; that thereupon an order bill of lading covering the shipment by railroad of said ore so loaded in Erie car No. 51611 from initial point of shipment, to wit, Clovis, California, to Coatesville, Pennsylvania, was issued by the Southern Pacific Company to said defendant in which the defendant herein is both consignor and order consignee and the Midvale Steel & Ordinance Company the "notify" party; that said defendant executed the appropriate shipping order covering the movement by railroad of said ore so loaded in Erie car No. 51611, as aforesaid, from Clovis, California, to Coatesville, Pennsylvania, consigned to the defendant with instructions to notify Midvale Steel & Ordinance Company.

Upon the arrival of said Erie car No. 51611 at destination, to wit, Coatesville, Pennsylvania, the said car loaded with said chrome ore was placed by the plaintiff upon the premises of the Midvale Steel & Ordinance Company for unloading on December 5, 1918; that on or about December 9, 1918, the said Midvale Steel & Ordinance Company refused to accept delivery of the said shipment of chrome ore.

On the 2nd day of January, 1918, the United States Railroad Administration wrote to the defendant the following letter:

"Mr. R. D. Adams
Humboldt Bank Bldg.
San Francisco, Cal.
Dear Sir:

On December 9, the Midvale Steel & Ordinance Company, Coatesville, Pa., refused to accept delivery of Erie Car #51611, chrome ore, shipped from the Pacific Coast, purchased by them from E. C. Humphreys Company, Chicago, Ill.

I accordingly communicated with E. C. Humphreys Company, requesting that they furnish disposal orders for the car in order that further delay to same might be avoided. They advise me, however, that you were the shipper of same, and that they approached you for disposition.

I trust you appreciate that delays to equipment of this kind are very serious, and must be prevented as far as possible, and I will thank you to advise by return mail what disposition can be made of this shipment.

Yours very truly,
R. R. Blydenburgh".

And in answer to said above mentioned letter the defendant wrote to the United States Railroad Administration, as follows:

"January 8, 1919
United States Railroad Administration
Broad Street Station
Philadelphia, Pa.
Gentlemen:

Replying to your letter File No. G-30, Desk 1, in reference to Car Erie 51611, chrome ore shipped by us to the E. C. Humphreys Company, beg to advise that they have purchased this car from us and we have delivered the bill of lading to them. This was an order bill of lading shipment and we cannot at present take up the matter of disposition of the car without the bill of lading.

For your information will state that we have no place we can dispose of this car outside of the destination it is at present and would suggest that you take the matter up with the E. C. Humphreys Company.

Yours very truly,
Adams & Maltby,
By C. S. Maltby."

At the time of the shipment of said Erie car No. 51611 there existed between the defendant and the E. C. Humphreys Company a contract in writing. The shipment by said defendant of Erie car No. 51611 was made in pursuance of said contract with E. C. Humphreys Company, and the said Erie car No. 51611 was routed by defendant and sent "care E. C. Humphreys Company", as per order bill of lading.

At the time the said contract of transportation was entered into between the plaintiff and defendant herein as evidenced by said order bill of lading, the plaintiff herein had no knowledge or information of any kind whatever of the contract and arrangement hereinabove set out.

At or about the same time the defendant shipped two other cars known as the Pa. 294001 and Pa. 825285 under said contract with the E. C. Humphreys Company to the Midvale Steel & Ordinance Company, and an order bill of lading was issued for each of said last two mentioned cars; by the terms of said order bill of lading the said chrome ore contained in each of said cars last named was consigned to the defendant, R. D. Adams, Care E. C. Humphreys Company, Coatesville, Pennsylvania, which was the same method used in respect to Erie car No. 51611; and it was provided by all of said bills of lading that said Midvale Steel and Ordinance Company at Coatesville, Pennsylvania, should be notified. At the time when each of these said cars reached the Midvale Steel & Ordinance Company at Coatesville, Pennsylvania, it refused to accept delivery thereof; and after receipt of the letter of January 8, 1919, from Adams & Maltby to the United States Railroad Administration, the said Administration took the matter up with E. C. Humphreys Company therein referred to; and on the 13th day of January, 1919, one Reinhart, representing the E. C. Humphreys Company, went to the United States Railroad Administration and

asked it to unload and store the chrome ore in Erie car No. 51611, Pa. car 825285 and Pa. car 294001; and thereupon and at the request of E. C. Humphreys Company the said railroad unloaded the said chrome ore on the ground and on a platform on its right of way at Coatesville, Pennsylvania. Thereafter, the E. C. Humphreys Company sold the two Pennsylvania cars and, at the request of the said E. C. Humphreys Company, the two Pennsylvania cars were reloaded by the railroad and in March, 1919, were shipped to the parties designated by the E. C. Humphreys Company. The said E. C. Humphreys Company continued its efforts to sell, at a price satisfactory to said E. C. Humphreys Company, the chrome ore in Erie car No. 51611 after the disposal of the chrome ore in the two Pennsylvania cars and requested the said railroad to keep said ore in storage pending these efforts.

The said railroad kept the said chrome ore in storage, as aforesaid, until the 16th day of June, 1919, when in accordance with law and pursuant to the orders of the Railroad Administration the railroad sold the said ore for charges, and received therefor the gross sum of $765.00.

At the time of the shipment of the said chrome ore in Erie car No. 51611, the Southern Pacific Company issued to the said defendant, R. D. Adams, the said order bill of lading. The said defendant attached this order bill of lading to a draft on the E. C. Humphreys Company and sent the bill of lading and the draft to the First National

Bank of Commerce at Detroit. The amount of said draft was $2,325.13; and, prior to the arrival of said Erie car No. 51611 at Coatesville, Pennsylvania, the said E. C. Humphreys Company paid the said draft and received the bill of lading, and, on the arrival of said car at Coatesville, Pennsylvania, directed the disposition thereof.

The said plaintiff herein had no knowledge or information of any kind whatever of any arrangement between the defendant, R. D. Adams, and the E. C. Humphreys Company, or of the issuance and payment of the draft mentioned and hereinabove set out.

The plaintiff herein sold the said shipment of chrome ore, pursuant to law and the orders of the Railroad Administration, after proper and legal notice to the defendant consignor and consignee for the best price it could obtain under all the circumstances and, therefore, realized the greatest sum available for said chrome ore under all the existing circumstances in connection with said shipment.

The charges on this shipment of chrome ore up to the time of placement at the Midvale Plant at Coatesville, Pennsylvania, were, as follows:

Demurrage at point of origin	$12.00		
Diversion at Tucson, Arizona	2.00		
Freight charges at rate of 84.5 cents per 100 pounds, Clovis, Cal. to Coatesville, Pa.	859.37		
	873.37	War	Tax
Against these charges we credit net proceeds of sale, $758.66, applied	736.38	"	"
Leaving unpaid balance of	136.99	"	"

Additional charges accrued are:

P&R demurrage at Coatesville	130.00	War	Tax
PRR " " "	110.00	"	"
PRR unloading " "	7.63	"	"
PRR storage " "	1290.00		
Total to be collected $1685.97.	$1674.62		

Under the provisions of the published storage Tariff Schedules, shipments unloaded by the carrier to release equipment were charged storage at same rates as would have accrued under demurrage rules had the goods remained in the car. The reasonable rate to be charged, and the only rate which could have been charged for the storage of said chrome ore, was the rate fixed by the provisions of the published Tariff, to wit: Charges applicable after free time, forty-eight hours, has expired for each of the first four days $3.00, for each of the next three days $6.00 and for each succeeding day $10.00.

All of the charges mentioned herein, to wit, freight diversion, demurrage, storage and unloading are assessed and computed under appropriate Tariff Schedules published and filed by the plaintiff with the Interstate Commerce Commission as provided by law, and that they are in all respects legal and proper.

R. D. Adams has not paid any of said charges including freight, diversion, demurrage, storage and unloading of said shipment of chrome ore.

At the time the said bill of lading herein referred to was issued to the said defendant, he did not reside at Coatesville, Pennsylvania and said defendant did not accept delivery of said chrome ore at Coatesville, Pennsylvania.

The said bill of lading so as aforesaid issued by the Southern Pacific Company to R. D. Adams, defendant consignor and consignee, shows upon its face that said shipment of chrome ore to Coatesville, Pennsylvania, was made at the request of the defendant, R. D. Adams; and the "notify" party, Midvale Steel & Ordinance Company, refused to accept the said shipment of chrome ore upon its arrival at Coatesville, Pennsylvania.

The Federal Order No. 34A effective at the time of the arrival of this freight read, with reference to unperishable freight, in part, as follows:

> "Carriers subject to Federal control shall sell at public auction to the highest bidder without advertisement carload and less than car-

> load non-perishable freight which has been refused or is unclaimed at its destination by consignee *after the same has been on hand sixty days.* Consignee, as described in the waybilling, shall be notified of arrival of shipment in all cases and such notice shall contain a provision that if freight is unclaimed or undelivered for fifteen days after expiration of free time at destination, it will be treated as refused and may be sold without further notice sixty days *from date of arrival.*"

The Pennsylvania Statute applicable to the sale of freight which has not been taken by the owner or consignee and which statute was in effect at the time is known as "No. 965, An Act Relating to the liens of common carriers, and others".

R. D. Adams, defendant herein, did not give any direct personal notice to the plaintiff or to the Pennsylvania Railroad to store the shipment in car Erie 51611, and R. D. Adams at all the times herein mentioned steadfastly refused to give or make any disposition order of said car Erie 51611 to plaintiff or to the Pennsylvania Railroad.

(Tr. 20-29; Tr. 35-37.)

The Issues of Law.

3. ASSIGNMENT OF ERRORS.

1. The said United States District Court, in and for the Northern District of California, erred in denying the motion of the plaintiff and plaintiff

in error to strike out portions of the original answer filed by the defendant in said cause of action.

2. The said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action.

3. The said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action, and in entering judgment in accordance therewith.

4. The said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of defendant and defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action in this: That said decision is against law.

5. The said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment

thereon in favor of defendant and defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action, in this: That said decision and said judgment is against law.

6. The said United States District Court, in and for the Northern District of California, erred in holding that plaintiff had knowledge of the sale and passing of title to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

7. The said United States District Court in and for the Northern District of California, erred in holding that Humphreys took any orders from Adams, except as agent for Adams.

8. The said United States District Court, in and for the Northern District of California, erred in holding that Humphreys Company, and not defendant, was obligated to plaintiff for the storage of said chrome ore after January 8, 1919.

9. The said United States District Court, in and for the Northern District of California, erred in holding that defendant Adams, was entitled to and should receive the proceeds of the sale of said chrome ore, when Humphreys Company was the owner at the time of sale.

10. The said United States District Court, in and for the Northern District of California, erred in

assuming that plaintiff was dealing with Humphreys Company otherwise than as the agent for defendant, Adams.

11. The said United States District Court, in and for the Northern District of California, erred in holding that the plaintiff and plaintiff in error had notice of the sale of the said chrome ore to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

12. The said United States District Court, in and for the Northern District of California, erred in holding that the liability of the shipper for the lawful charges accruing in this case arose out of considerations of ownership and not out of the request for the service.

13. The said United States District Court, in and for the Northern District of California, erred in considering the question of ownership of the said chrome ore, raised by the defendant and defendant in error, in making its decision in said action; and upon the evidence and record herein, the said Court should have rendered its decision in favor of the plaintiff and plaintiff in error in accordance with the prayer of the complaint in said action, and against the defendant and defendant in error.

Argument.

4. OUTLINE OF POINTS URGED BY PLAINTIFF IN ERROR.

(a) That the storage charges sought to be recovered in this action of and from the said defendant constitute part of the transportation charges.

(b) The original and primary liability of the consignor remains even in those cases where the carrier has entered into a specific contract to look to one other than the shipper for payment of such charges.

(c) The payment of storage charges arises by operation of law and not by contract and they are within the contemplation of the parties to any contract of shipment at the time it is entered into.

(d) The carrier here is not concerned with any question of title to goods or property shipped, but the question at issue is the payment of lawful tariff charges.

(e) In view of the finding of the lower Court that title to this consignment was in the E. C. Humphreys Company after January 8, 1919, it is legally impossible to allow the defendant in error the proceeds of the sale of said property.

Consideration of Assignment of Errors.

5. FIRST ASSIGNMENT.

The first assignment of error is in connection with the refusal of the United States District Court

to strike out portions of the answer filed by the defendant in error in said cause. The motion of plaintiff in error to strike out parts of the answer was directed to the following portions of said answer; and should have been granted.

> "Said defendant entered into a contract in writing with E. C. Humphreys Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, by which said defendant agreed to sell and deliver to said E. C. Humphreys Company 1046 tons of low grade and 608 tons of high grade chrome ore; that a copy of said agreement marked 'Exhibit A' is hereto attached, hereby referred to and made a part hereof for all purposes, and that in pursuance of said agreement"
>
> (Tr. page 11, lines 23-32.)
>
> "That at the time of the issuance of said bill of lading to the said R. D. Adams, the said R. D. Adams did not reside at Coatesville and did not expect delivery of the said chrome ore at Coatesville, Pennsylvania; that the value of said chrome ore at said time of shipment was the sum of $2,852.13; that after the issuance of said bill of lading the said defendant endorsed the same and delivered it to the said E. C. Humphreys Company who thereupon became the owner and consignee of the said shipment of chrome ore; that the said shipment of chrome ore was destined for and intended for the Midvale Steel and Ordinance Company; that this defendant is informed and believes and therefore alleges that the said E. C. Humphreys Company agreed to sell the said car of ore to said Midvale Steel & Ordinance Company;"
>
> (Tr. page 12, lines 13-29.)
>
> "That thereupon the said E. C. Humphreys Company directed and requested the Director

General of Railroads to unload the said ore and to store the said chrome ore until it, the said E. C. Humphreys Company, could re-sell it to some other person; that thereupon the said E. C. Humphreys Company for three or four months attempted to re-sell the said chrome ore to some other person, firm or corporation; that the said Director General of Railroads in compliance with the said request and demand of the said E. C. Humphreys Company unloaded the said ore and stored the same;"

(Tr. page 13, lines 2-14.)

"That on the contrary the said E. C. Humphreys Company agreed to pay said freight on the said ore; that after the ore had remained in storage as requested by the said E. C. Humphreys Company"

(Tr. page 13, lines 16-20.)

"That all of said sums were incurred at the special instance and request of the said E. C. Humphreys Company;"

(Tr. page 14, lines 1-3.)

"That the reasonable value for the storage of said ore could not exceed the sum of $100.00; that the said ore remained stored at the request of the said E. C. Humphreys Company for three or four months after the arrival thereof at Coatesville, Pa.;"

(Tr. page 14, lines 4-9.)

"That the said E. C. Humphreys Company accepted the said shipment and agreed to pay the freight therefor and ordered the ore stored as hereinabove set forth."

(Tr. page 14, lines 16-19.)

It is contended by the plaintiff in error that the above portions of the answer should have been stricken out by the Court for the reason that the matter so alleged is not material to any of the

issues raised by the complaint of the plaintiff in error. The contention of defendant in error that the shipment of ore was sold to the E. C. Humphreys Company raises the question of ownership which it seems clear, does not enter into this case.

We think all of the above portions are immaterial: First, because the substance of the parts asked to be stricken out is argumentative and said portions are conclusions of law; second, it is all immaterial because it relates to a shipment of ore to others than the Midvale Steel & Ordinance Co., for whose use the shipment involved in this litigation was apparently originally intended; and, third, it is immaterial for the reason that it purports to show that the defendant sold this shipment of ore to the Humphreys Company, that the latter paid for it, accepted it and directed the railroad as to its disposition.

The Courts, however, have uniformly held that in a suit by a carrier against one who, by executing a bill of lading and shipping order requests a certain transportation service, the *question of the ownership is immaterial and that the original liability of the shipper for the lawful charges arises out of the request for service and not out of considerations of ownership.*

In considering this very question, Judge Hawley, of this District Court of Appeal, said:

> "The question of ownership may be considered immaterial, under the facts of this case.

> The rule is that the consignor is the party primarily liable for the payment of the freight, and this rule is enforced, independent of the question whether the consignor is the owner, and regardless of the question whether the payment of freight is secured by a lien on the cargo, because the consignor is the party for whom the service is performed. This rule is applied to clauses, often found in bills of lading, 'he or they paying freight', or 'he, the consignor, paying freight'."
>
> *Portland Flouring Mills Co. v. British F. M. Ins. Co.,* 130 Fed. 860 at 864.

And, in deciding the above case, Judge Hawley cited and referred to the case of *Wooster v. Tarr,* 85 Am. Dec. 707, in which Judge Bigelow, C. J., said:

> "The question raised in this case is very fully discussed in Blanchard v. Page, 8 Gray, 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between the shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. * * * Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or

owner may be inferred, *this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.*"

Wooster v. Tarr, 85 Am. Dec. 707;

P. C. C. & St. L. Ry. v. Fink, 250 U. S. 577;

Great Northern Ry. v. O'Connor, 232 U S. 508.

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6. SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERRORS.

The second, third, fourth and fifth assignments of errors deal with the failure of the United States District Court to hold defendant in error responsible, as a matter of law, for the storage charges which accrued upon this freight subsequent to January 8, 1919, and up to the time that the ore in question was sold by the carrier in accordance with the statute of Pennsylvania and order of the Director General governing the sale of unclaimed freight.

Corpus Juris lays down the broad proposition, as follows:

"The owner of goods for whose benefit and under whose direction they are shipped is liable for the freight charges."

10 Corpus Juris 447, Section 702 (c) and other cases cited.

Barnard v. Wheeler, 24 Maine 412;

Grant v. Wood, 47 Am. Dec. 162.

And the general rule is aptly expressed by Mr. Hutchinson in his work on Carriers, in the following way:

> *"The remedy against the consignee is not exclusive although he may be the owner of the goods. It is held not to be obligatory upon the carrier to collect the freight of him* even when the bill of lading contains the clause 'he paying the freight thereon'. Such provision, it has been decided, is not intended for the exclusive benefit or accomodation of the freighter or shipper of the goods, and *imposes no* duty on the carrier to collect the freight of the consignee, but he may even waive his lien upon the goods by delivering them to the consignee *without requiring pre-payment of the freight and still hold the shipper liable upon the contract of shipment."*

It has been held that under the Interstate Commerce Act, the term "transportation" embraces all services in connection with the shipment, *including storage of goods after arrival at destination.* It is apparent, therefore, that the charges here in question, having been assessed for storage service following the transportation of the lading to destination, are "transportation charges" within the meaning of Section 1 (3) of the Interstate Commerce Act.

41 Stat. L. 474; U. S. Comp. Stat. Sec. 8653 et seq.

It is admitted that the defendant in error, R. D. Adams, was the consignor of the shipment here under consideration and the consignor with whom

the contract of shipment is made is primarily liable for the payment of the freight and other transportation charges whether he is the owner of the goods or not.

10 Corpus Juris, Sec. 699, page 445 and cases there cited.

By an examination of the authorities in reference to the questions here under discussion, it will be found that the original and primary liability of the shipper for transportation charges exists even where the provisions of the bill of lading direct that the charges shall be paid by the consignee or owner and the following authorities will be found to uphold this statement.

Spencer v. White, 1 Tredell 236 (N. C. 1840);
Layng v. Stewart, 1 W. & S. 222 (Pa. 1841);
Coal & Coke Ry. Co. v. Buchanan River C. & C. Co., 87 S. E. 376.

And further in this connection, even where the notation "charges collect" is found incorporated in the bill of lading signed by an agent of the carrier, that does not constitute a special contract precluding the carrier from looking to the consignor, who is primarily liable, for the transportation charges.

S. Cotton Oil Co. v. So. Ry. Co., 95 S. E. 251;
S. A. L. Ry. Co. v. Montgomery, et al., 112 S. E. 652.

Upon examination of the case of Wells Fargo & Co. v. Cuneo, it is found that an agreeement by

a carrier with a shipper to collect its transportation charges from the consignee and no other person, did not prevent recovery from the shipper. The general rule being that the consignor is primarily liable for such charges.

Wells Fargo Co. v. Cuneo, 241 Fed. 727.

"The consignor is ordinarily liable for freight charges. He requires the carrier to perform the service when he delivers the goods for transportation and thereby obligates himself to pay therefor. *The usual stipulation in the bill of lading that the consignee shall pay the freight imposes no obligation on the carrier to insist on payment of freight before delivery to the consignee.* It is not a part of the contract between consignor and carrier that the latter shall collect its bill of the consignee. The carrier may neglect to collect of the consignee and collect of the consignor."

N. Y. C. R. R. v. Warren Ross Lumber Co., 137 N. E. 324.

And the liability of the consignor remains irrespective of any contract to collect freight charges from the consignee:

C. C. C. & St. L. Ry. v. Sou. C. of C., 248 S. W. 297;

N. Y. C. R. R. v. Federal Sugar Refining Co., 139 N. E. 234.

It will be observed that the above cited cases deal mostly with the collection of freight charges as such, but is the contention of plaintiff in error that, *under the Interstate Commerce Act, the term "transportation" is broad enough to and does embrace all*

services in connection with the shipment of property, including storage of same after arrival at destination and it has been so held by our Courts.

The case of *Cleveland C. C. & St. L. Ry. Co. v. Dettlebach* will be found to be an interesting and instructive case on this very question and Justice Pitney, who delivered the opinion of the Court, said, in speaking of the carrier's responsibility as a warehouseman:

> "And this is quite in line with the letter and policy of the commerce act, and especially of the amendment of June 29, 1906, known as the Hepburn act (34 Stat. at L. 584, chap. 3591, Comp, Stat. 1913, Sec. 8563) *which enlarged the definition of the term 'transportation'* (this under the original act, included merely 'all instruments of carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and *all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.*
>
> From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, *in order to prevent overcharges and discimination of performing such additional services it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation' and sub-*

jected to the provisions of the act respecting reasonable rates and the like."

Cleveland C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 453 at 457.

It cannot be contended other than that the storage charges which the plaintiff in error is seeking here to recover are terminal charges and, together with demurrage and other charges, can be recovered in cases of this character, and in support of this contention, we quote the language used by District Judge Young in the case of *Lehigh Valley R. Co. v. United States*:

"Thus, we see by the language of the Act, 'transportation' is defined to include terminal charges. It must be conceded that demurrage being a charge for the detention of a car because of the use of the car and track until unloaded is a terminal charge * * *.

To hold otherwise than that demurrage is part of transportation and part of the terminal charges would be to open the door to a railroad company to allow favored patrons to occupy the tracks and the cars for such demurrage charges as they chose * * *.

If, therefore, the terminal charges are part of the transportation and if demurrage charges are included in the term 'terminal charges', then clearly the failure to observe these tariffs and the soliciting and receiving of concessions are misdemeanors for which a prosecution will lie."

Lehigh Valley R. Co. v. U. S., 188 Fed. 879 at 885-6.

And to the same effect we find the case of *Davis v. Timmonsville Oil Co.,* where the Court said:

> "Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage."
>
> * * * The duty of the carrier, the consignee, and the shipper is arbitrarily fixed, each is charged with notice of all that is thereby imposed and neither the negligence of the carrier to collect the rate, unless such negligence continue beyond the statutory period of limitations, nor the failure of the shipper or consignee, however innocently done, to pay it, may be urged as a defense in an action for its recovery."
>
> *Davis v. Timmonsville Oil Co.,* 285 Fed. 470 at 472-4.

It becomes apparent from the examination of the above cases and the holding of the Courts therein that the instant action embraces all transportation charges, including the *storage which is the great bone of contention in this case,* for the payment of which the defendant in error is originally and primarily liable. It would seem, therefore, that any further citation of authorities upon this particular question would be useless and unnecessary.

It is admitted in this case that all of the charges mentioned herein, to-wit, freight, diversion, demurrage, *storage* and unloading are existing and computed under appropriate tariff schedules, published and filed by the plaintiff with the Interstate Com-

merce Commission as provided by law and that they are in all respects legal and proper. But, notwithstanding this admission, it is, of course, well-settled that the provisions of a carrier's tariff on file with the Interstate Commerce Commission are notice to the world and binding upon shippers whether the latter have actual knowledge of the terms of the tariff or not, and the rates, as determined by the tariff, must be enforced irrespective of the contract between the parties.

L. & N. R. R. v. Maxwell, 237 U. S. 94.
Western Transit Co. v. Leslie, 242 U. S. 448;
P. C. C. & St. L. Ry. v. Fink, 250 U. S. 577;
York & Whitney Co. v. N. Y. C. R. R., 256 U. S. 406;
Cook v. Nor. Pac. Ry., 203 Pac. 512;
Sinclair Ref. Co. v. Schaff, 275 Fed. 769.

We respectfully submit that the learned Judge below was in error when he determined that

> "demurrage and storage after carriage completed is implied rather than expressed and arises only incidentally." (Tr. page 40.)

It would appear, from an examination of the authorities, to be settled law that at the time of entering into the contract of shipment the accrual of demurrage and storage charges is a matter within the contemplation of the parties to the contract and the assessment of such charges arises by operation of law. The rule is well expressed in the case of *Pennsylvania Railroad Company v. Whit-*

ney & Kemmerer, 73 Pa. supra, 588, wherein the Court said, at pages 995-6:

> "Under the Act of Congress the charge for demurrage becomes a charge incidental to the transportation of the property, and it is the duty of the carrier to exact it from all shippers without discrimination. When the defendants shipped the car in question they are presumed to have known that the tariffs filed with the Interstate Commerce Commission would require the carrier to collect a demurrage charge of $1 per day, excluding Sunday and legal holidays, for each day the car was held by plaintiff at its destination and not unloaded by the consignee within forty-eight hours after placement of said car for delivery. The law was notice to the shipper that the charge would be made upon the shipment and the carrier was not required to give notice that it would comply with the duty by the law imposed."
>
> *Pa. Railroad Co. v. Whitney & Kemmerer,* 73 Pa. supra 588.

In the case just cited the Court held the shipper responsible for the transportation charges which had accrued—and we think properly so. This case is very similar to the one at bar and we think exactly in point as to the contention of the plaintiff in error that the terminal charges, such as demurrage and storage after carriage completed, are not implied but arise by positive law.

> "Such charges do not result from any private contract between the carrier and either the shipper or consignee. They are not the subject of private contract. When the schedule of tariff is duly filed and published, the rates become matters of positive law and ship-

pers, carriers, consignors and the like are charged with knowledge of them. The carrier is bound to collect and the consignor or shipper is bound to pay the correct charges as set forth in the published tariffs.''

Id. 595;

Phila. & Reading Ry. Co. v. Baer, 56 Pa. Sup. Ct. 307;

W. J. & C. Shore R. R. Co. v. Whiting L. Co., 71 Pa. Sup. Ct. 161.

It is anticipated that perhaps the defendant in error may raise some question as to the reasonableness of the charges for storage which are here attempted to be recovered but the present action is brought to recover transportation charges, which include the *storage accured,* provided for in tariffs lawfully and admittedly on file with the Interstate Commerce Commission. Any question, therefore, which may be raised by defendant in error with regard to the reasonableness of such charges will be beyond the jurisdiction of this Court for the reason that the decision of any such question is dependent upon a preliminary resort to the Interstate Commerce Commission.

Great Northern Ry. v. O'Connor, 232 U. S. 508;

Chesapeake & Ohio C. & C. Co. v. T. & O. C. Ry., 245 U. S. 917;

Great Northern Ry. v. Merchants Elevator Co., 295 U. S. 285.

7. SIXTH, SEVENTH, EIGHTH, TENTH, ELEVENTH AND TWELFTH ASSIGNMENTS OF ERRORS.

The sixth, seventh, eighth, tenth, eleventh and twelfth assignments of errors relate to the question of ownership of the ore in question as between defendant in error and the E. C. Humphreys Company and the notice given the carrier thereof. But, as we have heretofore observed, carriers are not concerned with questions of title.

232 U. S. 508.

In the case of *Great Northern R. Co. v. O'Connor,* the Court, in determining a question of rates used the following language:

> "This was the ruling in Interstate Commerce v. Delaware L. & W. R. Co., 220 U. S. 235, where it was held that the carriers were not concerned with the question of title; but must treat the forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles."
>
> *Great Northern R. R. Co. v. O'Connor,* 232 U. S. 508 at 514-516.

In dealing with a case involving the liability of a consignee for the transportation charges following his acceptance of the goods transported, the United States Supreme Court made use of the following language:

> "It is alleged that a different rule should be applied in this case because Fink, by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no

> proof that such agreement was known to the carrier *nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods.*"
>
> *P. C. C. & St. L. Ry. v. Fink,* 250 U. S. 577 at page 582.

The above language applies with even greater force to a case involving the liability of a shipper, for, as has been shown, the consignor is originally and primarily liable for payment of transportation charges, even though the carrier has by express contract agreed to look to the consignee for payment of its charges. A carrier has the right to look to the shipper for payment of the transportation charges and no agreement can be entered into to prevent the collection of any but the lawful charges.

> *Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. R.,* 95 So. 93.

It would seem, then, that the above authorities would dispel any idea which the defendant in error might advance that by carrying out the directions of the E. C. Humphreys Co. with regard to the storage of the ore, the carrier had elected to look to that company for the payment of the storage charges, for, as we have observed, the ultimate liability of the shipper still remains.

> "The railroad company may demand the amount of transportation charges from the consignee or it may collect from the consignor. It cannot make an election nor be held to an estoppel without violating the purpose and spirit of the Interstate Commerce Act, U. S.

> Comp. Stat. Sec. 653 et seq.) *In order to prevent preference, it is obliged to collect its freight charges and if it cannot get them from one party, it must look to the other.* Delivery of the goods without collection is no waiver or release of any or either party."
>
> *N. Y. C. R. R. v. Federal Sugar Refining Co.,* 139 N. E. 234.

And, inasmuch as the defendant in error, R. D. Adams, who was both the consignor and the consignee in the instant case, and the ostensible consignee, the Midvale Steel & Ordinance Co., and all other parties concerned herein, refused the shipment upon its arrival at destination, it becomes obvious that the carrier was forced to look to the shipper for reimbursement of its charges, which, in this case, it is contended, *include all charges from the time of shipment to the time of sale of the said lading by the carrier.*

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8. NINTH ASSIGNMENT OF ERROR.

The ninth assignment of error is based upon the opinion of the District Court and the utter impossibility of allowing one other than the owner the proceeds of the sale of said chrome ore.

Upon reference to the Court's decision upon the merits (Tr. page 40), it will be discovered the Court finds that

> "plaintiff is entitled to recover of and from defendant the charges set out in said statement to and including January 8, 1919."

And also finds that

> "The defendant was not the owner of the goods and that plaintiff knew this on and after January 8, 1919."

In view of the fact, therefore, that the sale did not take place until after January 8, 1919, to-wit, about the 16th day of June, 1919, and considering this fact and that the defendant in error was not the owner of the goods, we fail to see how he could properly receive the proceeds of the sale of the ore when it appears herein that the E. C. Humphreys Company had already paid the defendant in error for the ore. It would seem a necessary corollary that if, after January 8, 1919, and on the day of the sale of the ore, E. C. Humphreys Company was the owner thereof, that it should receive the proceeds of the sale of its own property.

Conclusion.

We attempt here to summarize the argument, if perchance it has reached that dignity, in this wise:

By the admitted facts (Tr. pages 20-29) herein, the defendant is both the consignor and order consignee and as such shipped from Clovis, California to Coatesville, Pennsylvania, in November, 1918, a carload of chrome ore upon which he has not paid legal freight, diversion, demurrage, storage, unloading and other charges incidental to said shipment.

That he refuses to pay same upon the ground that he sold the lading during transit to the E. C.

Humphreys Co., and at the time of its arrival at destination, he was not the owner, and, therefore, refused to receive said ore or to give or make disposition orders for same, claiming that the E. C. Humphreys Company should and did give its order as to the disposition of said car and its contents.

But the plaintiff in error had no knowledge or information of any kind whatever of any arrangement between the defendant in error and the said E. C. Humphreys Company, or of the issuance and payment of the draft mentioned and set out in paragraph IX of the admitted statement of facts. (Tr. pages 26-27.)

That after the refusal of any party to the shipment or bill of lading, to accept and dispose of the ore, the plaintiff in error sold the same, under and pursuant to the mandate of the law and the orders of the Railroad Administration, after proper and legal notice to the defendant consignor and consignee, for the *best price* it could obtain under all the circumstances; that there was received as the proceeds of said sale $758.56.

That after applying the proceeds of the sale to the whole charges there was left a balance of $1,685.97 lawfully accrued as a result of the transportation services admittedly performed, which is legally due from someone.

It is clear that there are but three parties who could be, under any circumstances, called upon to pay these charges, and those are: Plaintiff in error,

E. C. Humphreys Company and Midvale Steel and Ordinance Company. We cannot ask the Humphreys Company to pay same because it was neither shipper nor consignee, but merely the "care of party," and consequently, as a matter of law, is to be regarded merely as the agent of the consignor, and has no individual responsibility or liability in this connection.

Neither can we ask the Midvale Steel and Ordinance Company to pay these charges, because that company did not accept and receive the shipment, and, therefore, did not in any sense ratify the contract of transportation between plaintiff in error and defendant in error, Adams.

And, consequently, by the process of elimination, R. D. Adams, the defendant in error, is the only party involved in the transaction to whom the plaintiff in error can properly look for its charges lawfully made for the transportation services so rendered.

As it is the lawful right of the plaintiff in error, he has elected to sue the defendant in error to recover the charges he contracted to pay and in view of the cited authorities it seems entirely unnecessary to argue further that it is not only the lawful right, but in this case *it was the duty of plaintiff in error to look to the original and primary source* for the collection of the transportation charges imposed by law, to-wit, to R. D. Adams, defendant in error.

If, as is here admitted, the plaintiff in error entered into a written contract to pay the "transportation" charges which should accrue against his property and if, "transportation" embraces all services in connection with the shipment, *including storage of goods* after arrival at destination, is he not then originally and primarily liable for all such charges? If Adams was liable originally, there was nothing to change his liability and he, therefore, remains indebted to the government in the amount sued for.

The bill of lading, together with the tariff schedule approved by the Interstate Commerce Commission constitutes the contract which tied Adams to the debt the plaintiff in error now seeks to recover and, as was said by Judge Cushman in *Great Northern Ry. v. Hyder,* 279 Fed. 783, "the shipper, the carrier and the consignee are all agents and trustees of the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the charges as fixed by the filed, posted and published tariff.

We, therefore, most respectfully submit that the defendant in error solicited the service when he delivered the goods for transportation and thereby obligated himself to pay therefore.

We ask, therefore, that the case be remanded to the lower court with directions to enter judgment

in accordance with the prayer of the amended complaint in said cause.

Dated, San Francisco,
October 17, 1923.

Respectfully submitted,

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JAMES E. GOWEN,
Of Counsel.